

1730853 (Migration) [2020] AATA 6051 (9 December 2020)

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DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1730853

MEMBER: Hugh Sanderson

DATE: 9 December 2020

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicants Partner (Residence) (Class BS) visas.

Statement made on 9 December 2020 at 12:37pm

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Spouse) – applicant was no longer in a spousal relationship with the sponsor– victim of family violence– relationship ceased with sponsor– applicant had provided false or misleading information – breached PIC 4020 – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5F, 65
Migration Regulations 1994, Schedule 2, cl 801.226

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
He v MIBP [2017] FCAFC 20
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50
Trivedi v MIBP [2014] FCAFC 42

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 28 November 2017 to refuse to grant the applicants Partner (Residence) (Class BS) visas under s.65 of the *Migration Act 1958* (the Act).
5. The applicants applied for the visas on 17 May 2013. The delegate refused to grant the visas on the basis that the first named applicant (hereinafter "the applicant") did not satisfy the requirements of cl.801.226 of Schedule 2 to the Migration Regulations 1994 because the delegate found the applicant did not meet the criteria in public interest criteria 4020 (PIC 4020). The delegate found the applicant had provided information that was false or misleading in a material particular in relation to the visa and there were no relevant compassionate or compelling circumstances to justify granting the visa.

Background

6. The applicant is a citizen of Vietnam and is currently [age] years old. The second named applicant is her daughter who is [age] years old and applied for the visa on the basis of being a member of the family unit of a person who met the primary criteria. The applicant was sponsored for her visa by [Mr A] who was born in Vietnam and is an Australian citizen. He is currently [age] years old.
7. The applicant claimed she first met the sponsor [in] August 2011 in Vietnam. A relationship developed and they planned to marry each other. The applicant was granted a Subclass 300 Prospective Marriage visa on 25 January 2013 and first entered Australia [in] February 2013. The parties were married [in] March 2013. The applicant was granted a Subclass 820 Partner (Temporary) visa on 6 June 2013.
8. In support of the application for the Subclass 801 Partner (Residence) visa the applicant provided a number of documents to support the claim that she was in a genuine and continuing relationship with the sponsor. This included the following:
 - Statement from the applicant dated 18 May 2015 claiming the parties were living together and had been doing so for more than two years and their relationship is genuine and they are committed to each other;
 - Statement from the sponsor dated 18 May 2015 claiming the parties were living together and had been doing so for more than two years and their relationship is genuine and they are committed to each other;
 - Copies of the applicant's and the sponsor's driver's licences showing their home addresses being the home of the sponsor;
 - Copies of correspondence addressed to the applicant at the home of the sponsor;
 - Statement from the applicant's [sister], dated 13 May 2015 stating that she believed the relationship was genuine and continuing, they were a happy family and that she sees the sponsor who helps the applicant at her shop in [Suburb 1]; and
 - Statement from a friend of the applicant, [dated] 19 May 2015 stating that he believed the relationship was genuine and continuing and that he meets the sponsor and applicant when they pray in the temple at [Suburb 1] together.

9. The applicant's agent wrote to the Department on 19 January 2017 and 28 March 2017 noting the delay in granting the applicant's Partner (Residence) visa and requesting the matter be considered as soon as possible.
10. An officer from the Department telephoned the sponsor on 23 May 2017. The sponsor advised the Department that he was no longer in a relationship with the applicant. He claimed that she made him sign some paperwork around 2015 and, after he signed the documents, she left him. He said that as he was over [age] years old he could not remember the exact dates.
11. The Department wrote to the applicant on 7 June 2017 noting the information provided by the sponsor indicated that the relationship had ended. The applicant was invited to comment on or respond to the information. The applicant responded by claiming that she had been assaulted by the sponsor [in] June 2017 at [Suburb 2]. She provided photos showing injuries she claimed she had suffered. She claimed that she was applying to the court for an Apprehended Violence Order against the sponsor.
12. The applicant provided a statement she made to the NSW Police dated [date] July 2017 where she made the following claims:
 - After arriving in Australia she lived with the sponsor until August 2013 when he kicked her out of the house after he indecently assaulted her and her daughter;
 - The applicant made a complaint to police in [Suburb 2] and [Suburb 1] at that time;
 - After the applicant had been told by her agent that the sponsor was withdrawing his sponsorship of her application she dropped into the sponsor's house and after he opened the door she entered and after an argument where she accused him of sexually assaulting her daughter he assaulted her, punching her and pushing her out of his home;
 - The sponsor shut the door on the applicant and refused to let her back into the home and the applicant called the police who attended on the home; and
 - The sponsor took photos of the injury she suffered from the assault by the sponsor.
13. The Department wrote to the applicant on 24 October 2017 noting that as she was claiming that she had not lived with the sponsor since August 2013 it appeared she had provided false and misleading information in 2015 when she was claiming that she was living with the sponsor in a genuine and continuing relationship. It was noted the statement she provided to the police stated that she had only been living with the sponsor until August 2013. This indicated that the applicant had provided false and misleading information in a material particular in relation to the claim they were in a genuine relationship and therefore did not meet the criteria in PIC 4020. The applicant was invited to comment on or respond to this information.
14. The applicant emailed the Department on 14 November 2017 claiming that she was beaten by the sponsor and her daughter sexually abused in 2013. She said that she did not call the police then because she loved the sponsor. She claimed she made a report to the police in 2015 and 2017.
15. The applicant provided a letter from the [Suburb 2] Detectives Office of the NSW Police dated 3 June 2015 stating that [in] March 2015 the applicant and her daughter attended [Suburb 1] Police Station to report an indecent historical sexual assault. The detectives had tried to contact the applicant and her daughter several times since then but had received no

response. The detective had asked in the letter if the applicant and her daughter wished to proceed with the complaint. It is noted that the statement the sponsor provided in support of the grant of the Subclass 801 visa was dated 18 May 2015, after the original complaint was made to the police and no action was taken by the applicant with the police after the sponsor had provided the statement in support of her Partner visa application.

16. The applicant provided a statement where she made the following claims:

- On [date] March 2013 the applicant's daughter told her that the sponsor had gone into her room and embraced her and kissed her and then on the next day he did the same thing;
- On [date] March 2013 at about [time] the sponsor entered the applicant's daughter's room and embraced her, touching her breast and trying to take her clothes off;
- The applicant entered the room when she heard her daughter's screams and she confronted the sponsor about his actions;
- The next day her daughter went to live with the applicant's sister and the applicant continued to live with the sponsor;
- The sponsor forced the applicant to have sexual intercourse with him many times and he abused her;
- In July 2013 the applicant's daughter telephoned her saying that she missed her and when the sponsor saw the applicant crying he made threats against her;
- In August 2013 the sponsor told the applicant he did not want her to live at his house anymore and he kicked her out of the house;
- Two days later due to continuing threats being made by the sponsor she made a report of domestic violence to [a community organisation] in [Suburb 1];
- The next day, the applicant went back to the sponsor's house where he sexually abused her and because she was afraid of the sponsor she cooked for him and each week he would go to her shop to collect the food from her;
- In March 2016 the sponsor told her that she didn't need to cook for him any longer; and
- On [date] June 2017 a solicitor in [Suburb 2] told the applicant the sponsor was no longer sponsoring her application and she went over to his home to ask why he had contacted the Department and he pushed her out of the house and closed the door.

17. The delegate who considered the application noted the following:

- The applicant had provided the range of documents in May 2015 claiming that she and the applicant were in a genuine and continuing relationship and living together;
- The applicant had provided a statement to the NSW Police dated 11 July 2017 stating that she only lived with the sponsor until August 2013;
- The applicant had brought claims that she has suffered family violence committed by the sponsoring partner; and

- The claims made by the applicant as to family violence were inconsistent with the claims made in May 2015 that she was in a genuine and continuing relationship with the sponsor.

18. Based on this information, the delegate found that the applicant had provided information that is false or misleading in a material particular with regard to the statements and other information provided in May 2015 that she was living with and in a genuine and continuing relationship with the sponsor. The delegate found that the applicant did not meet the criteria in PIC 4020(1). As no information had been provided of any compassionate or compelling circumstances affecting the interests of an Australian citizen, permanent resident or eligible New Zealand citizen that justify the granting of the visa, the delegate found the applicant did not meet the criteria in PIC 4020.
19. As the applicant did not meet the criteria in PIC 4020, the delegate found the applicant did not meet the criteria in cl.801.226 and refused the application. As the second named applicant's application was based on being a member of the family unit of a person who met the primary criteria, her application was also refused.

Information to the Tribunal

20. The applicants appeared before the Tribunal by MS Teams video on 8 December 2020 to give evidence and present arguments. The Tribunal also received oral evidence from Ms [B] at [Organisation 1]. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
21. The applicant provided details of the current circumstances. She was living with her daughter and working part time in a [workplace]. She said the only relative she has in Australia is her younger sister who lives with her husband and two children.
22. The applicant said that she left the sponsor's home and started living with her sister in July or August 2013. She only remained there for two or three months because her brother-in-law did not want her living in the house. She then moved to rented accommodation in [Suburb 1], where she lived with her daughter for the next three years. She said that she moved out of that house in 2016 to move to other rented accommodation. She said that she has only lived with her daughter since she moved out of her sister's home.
23. The applicant said that her sister would often visit her in her home in [Suburb 1]. She said that her sister knew all about the problems that she had with the sponsor.
24. The applicant said that from the time that she applied for the visa until 2017 she had the services of a migration agent.
25. The Tribunal explained the basis of the Department's decision which was that the applicant had provided false and misleading information in respect of the documents she provided in 2015 claiming that she was living with and in a genuine and continuing relationship with the sponsor.
26. The applicant said that at that time she did continue to see the sponsor and she would cook for him and he would pick the food up from her at her workplace. She said that she did not live with him because she was scared of his violence but she still loved him. She claimed that she told her migration agent what had happened and that she was not living with the sponsor.
27. The Tribunal noted that the applicant provided documents from Centrelink and other government bodies and her driver's licence showing that she was living with the sponsor in

2015. This information appears to have been generated to present the picture that the applicant and sponsor were living together in the same household and to mislead the Department into believing the applicant and the sponsor were living together. The applicant said that she was terribly sorry, but because she came from Vietnam she did not know that she had to change the information she gave to Centrelink or any other government body.

28. The Tribunal invited the applicant to provide any compelling circumstances that affect the interests of Australia or compassionate or compelling circumstances that affect the interests of an Australian citizen, permanent resident or eligible New Zealand citizen to justify the granting of the visa. The applicant said that she loved her husband but he was violent and that he sexually assaulted her daughter. She said that she had been living in Australia for eight years and loved Australia.
29. The Tribunal noted the requirement that the circumstances must affect an Australian citizen, permanent resident or eligible New Zealand citizen. The applicant said that she had an auntie who lived in Australia, but she was not close to her. She asked the Tribunal to consider her own situation.
30. The applicant's daughter gave evidence in support of the application. The Tribunal explained the reason for the Department's decision and the fact that even if it has concluded that the applicant had provided information that is false or misleading in a material particular the criteria could be waived in particular circumstances. The applicant's daughter said that she had been living in Australia for a long time and it would be hard to go back to Vietnam. The Tribunal noted that the circumstances had to relate to an Australian citizen, permanent resident or eligible New Zealand citizen. The applicant's daughter then said that her stepfather had sexually abused her but she had done nothing about it because the sponsor begged her mother to forget it and he then agreed to sign the papers.
31. Ms [B] from [Organisation 1] gave evidence in support of the application. She said that she first saw the applicant in 2017. The notes from her case showed that she had seen another officer in 2013 where she claimed that she had been abused and that her daughter was not comfortable with the sponsor. She said that there was no contact from the applicant from 2013 until 2017. Ms [B] said that when she spoke to the applicant in 2017 she said that she always had the intention of continuing her relationship with the sponsor.
32. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

33. The issue in this review is whether the visa applicant meets PIC 4020 as required by cl.801.226 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting three years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and

- the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
34. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). Public interest criterion 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in a material particular?

35. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
36. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
37. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
38. The applicant provided extensive information in 2015 claiming that she was living with the sponsor and that their relationship was genuine and continuing. This included statements from the applicant and the sponsor where it was specifically stated that they lived together. The applicant provided a statement from her sister claiming that the applicant and the sponsor had a "happy family". The applicant provided information to various government organisations and correspondence addressed to her, such as Centrelink, the Roads and Maritime Services, Medicare and the applicant's daughter's school, indicating that she was living with the sponsor in his home in [Suburb 3]. This information was provided by the applicant to the Department in support of the claim that she was living with the sponsor in a genuine and continuing relationship. The Tribunal finds this information was false and misleading.
39. The evidence of the applicant is that she stopped living with the sponsor in July or August 2013. After spending about two or three months living with her sister, she and her daughter then moved to rented accommodation in [Suburb 1] that they were living in until 2016. Although she may have continued to see the sponsor and occasionally cooked for him, they did not live together at any time after August 2013. The Tribunal finds that in 2015 the parties were living separately and apart on a permanent basis and had been doing so for two years.

40. The applicant claimed that she did not know that she was required to tell various organisations that she was no longer living at the address she claimed she was living at with the sponsor. She claimed that this was because she was Vietnamese. The Tribunal does not accept this. The Tribunal finds that the applicant was engaged in a deliberate and calculated plan to provide false and misleading information to the Department for the sole purpose of obtaining a Partner (Residence) visa, knowing that her relationship with the sponsor was not ongoing or genuine and continuing. The applicant conspired with her sister to provide a false statement as to the alleged relationship between the applicant and the sponsor.
41. The applicant claimed that she suffered family violence committed by the sponsoring partner. There is little independent information to support this. It was stated that a complaint was made in 2013 to [Organisation 1], however, nothing further was done about this. A complaint was made to the police in March 2015, however, the applicant and her daughter did not take any further steps regarding this with the police and it appears they terminated any investigations into the complaint in June 2015. It is noted that after the complaint was made the sponsor provided a statement in support of the application and that no further steps were taken by the applicant or her daughter in relation to the allegations they made to the police.
42. Throughout the time that the applicant was applying for her visa, she had the services of a migration agent. Although she claimed she provided all information to the migration agent, including the fact that she had suffered family violence and was no longer living with the sponsor, no claim was made to the Department that the applicant had suffered family violence committed by the sponsoring partner or that the applicant was no longer living with the sponsor. The Tribunal has significant concerns as to the validity of the claims made by the applicant as to family violence when she has had the services of various organisations to assist her and, in particular, claims to have advised her migration agent of her circumstances and yet no claim was made that she suffered family violence at that time. In any event, whether the applicant had or had not suffered family violence is not relevant to the fact that in 2015 the applicant provided false and misleading information as to her alleged relationship with the sponsor and where she was living. In the documents she provided at that time she was claiming she and the sponsor had a mutual commitment to a shared life as husband and wife to the exclusion of all others and that they were living together. She claimed that they were regularly attending social events and going together to the Buddhist temple to pray. She claimed that they were living in harmony.
43. The Tribunal finds that the statements and documentation provided by the applicant in 2015 were false and misleading in a material particular in relation to the application for the visa. The documents provided a false narrative as to the claimed relationship between the applicant and the sponsor and claimed that the applicant was living with the sponsor in his home. This was a material particular when assessing whether the applicant was the spouse, as defined in s.5F of the Act, of the sponsoring partner which requires that the parties live together or do not live separately and apart on a permanent basis, that they have a mutual commitment to a shared life as husband and wife to the exclusion of all others and that their relationship is genuine and continuing.
44. For the above reasons, the Tribunal finds, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

45. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such

circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.

46. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
47. There is no information before the Tribunal that there are any compelling circumstances that affect the interests of Australia that would justify the granting of the visa.
48. The Tribunal invited the applicant to provide any compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen to justify the granting of the visa. In response, the applicant and her daughter both stated that they had been living in Australia for a long time and that they loved Australia and would find it difficult to return to Vietnam. As set out above, the particular circumstances must affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen. As neither the applicant nor her daughter fall into any of these categories, the Tribunal is not satisfied that the effect of the refusal of the visa on the visa applicant's themselves meets the criteria to justify the granting of the visa.
49. The only close relative the applicant has who lives in Australia is her sister. The applicant's sister is an Australian citizen and is married with two children. The applicant lived with her sister and her sister's family for about two or three months after leaving the sponsor in August 2013. Her sister provided a statement in 2015 claiming that she believed the relationship between the applicant and the sponsor was genuine and they had a happy family. This information appears false and misleading and indicates the applicant's sister was complicit in providing false and misleading information to the Department in support of the applicant's application.
50. The applicant has provided no information which would indicate her sister would be adversely affected if the applicant were refused a visa. There is nothing to indicate any continuing dependence of the applicant's sister on the applicant or any compassionate or compelling circumstances that affect the interests of the applicant's sister to justify the granting of the visa.
51. The only other relative the applicant identified as living in Australia is her aunt, with whom she said she does not have a close relationship with. There is no other person who is an Australian citizen, permanent resident or eligible New Zealand citizen who would be affected in any way if the applicant was refused the Partner visa and would justify the granting of the visa.
52. For the above reasons, the Tribunal is not satisfied that the requirements should be waived. Therefore, the Tribunal finds the requirements of PIC 4020(1) should not be waived.
53. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl.801.226.
54. As the Tribunal has concluded that the applicant does not meet the criteria in cl.801.226 and the decision to refuse her application must be affirmed, the second named applicant is not a member of the family unit of the person who meets the primary criteria for the grant of the visa. Accordingly, the decision to refuse her application must also be affirmed.

DECISION

55. The Tribunal affirms the decision not to grant the applicants Partner (Residence) (Class BS) visas.

Hugh Sanderson
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is **false or misleading in a material particular** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...